SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1075

SIDNEY C. KNIGHT, M. D.

versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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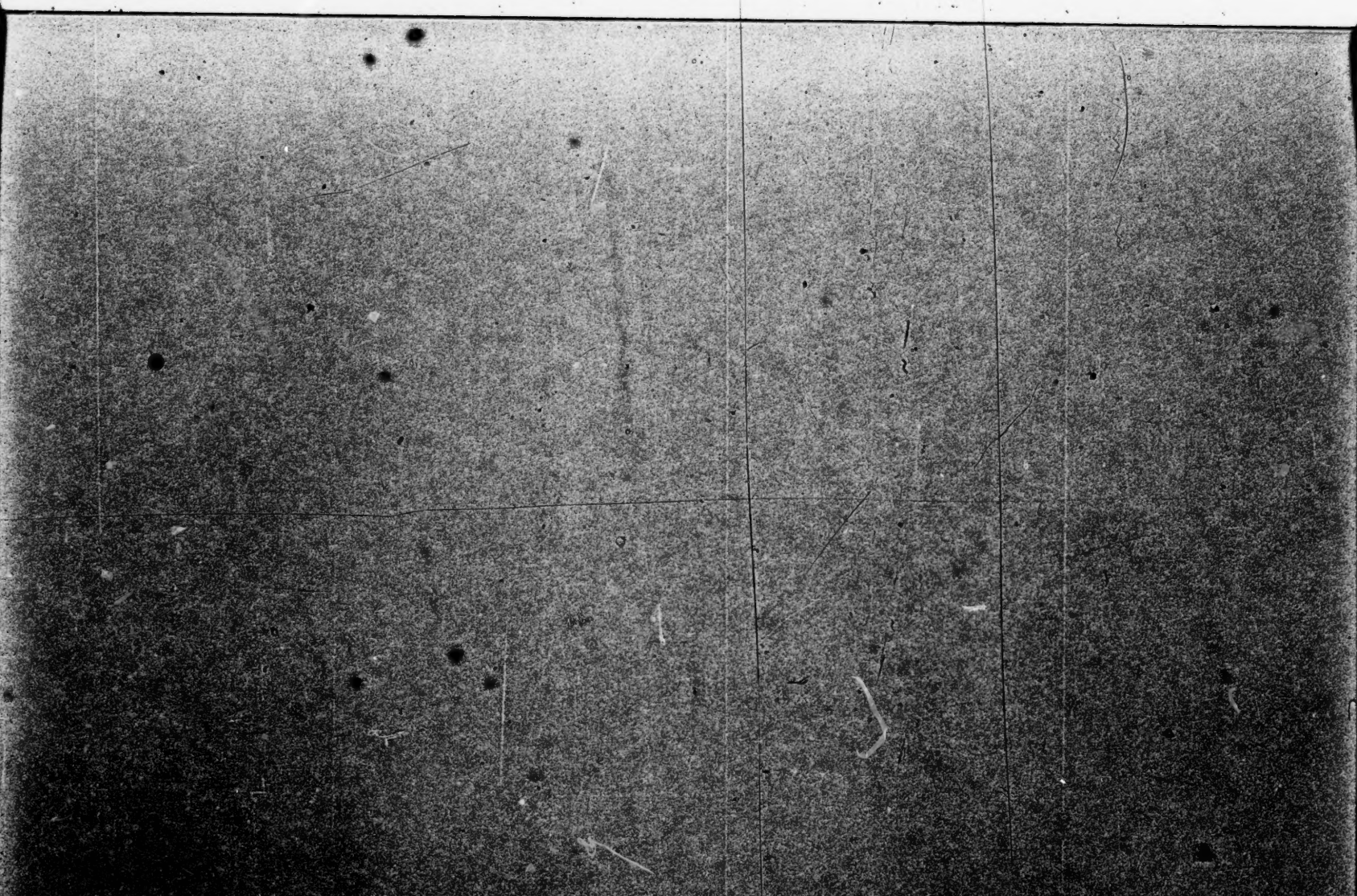

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No.

SIDNEY C. KNIGHT, M. D.

versus

LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of The Supreme Court of The State of Louisiana entered in the above entitled case October 25th, 1968.

OPINIONS BELOW

Petitioner was denied a writ of mandamus by The Civil District Court in and for Orleans Parish Louisiana on April, 13, 1967. This decision was affirmed on appeal by The Fourth Circuit Court of Appeal on June 10th, 1968, and Re-hearing was denied July 1st, 1968. This decision is reported as *KNIGHT vs. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS*, 211 So.

2d 433. Application was made for writs of review to The Louisiana State Supreme Court which were denied October 25, 1968. This is reported in 214 So.2d 716.

JURISDICTION

The jurisdiction of The Court is invoked pursuant to 28 USC §1257 (3). An application to this court for an extension of time in which to file this petition, up to and including February, 21, 1969 was granted January, 23rd, 1969 by Mr. Justice Black.

QUESTIONS PRESENTED

1. Does the holding of a hearing by a State Medical Board (wherein the license of a physician is suspended for 5 years) while criminal charges are pending against the physician, deprive him of due process of Law?

2. Does the suspension by a State Medical Board of a physician's license for 5 years based only upon the Board's evidence, and where the physician declines to testify because of pending criminal charges brought by the same Board deprive the physician of due process of Law?

3. Is a physician given a fair hearing and due process of Law when he is forced to either give evidence at an administrative hearing held by a State Medical Board to suspend his license or allow it to go by default when he stands under criminal charges brought by The Board,

on evidence procured by The Board, is to be prosecuted by a special prosecutor paid by The Board, and The Board rules that his failure to testify will be considered adversely to him?

4. Is a physician given a fair hearing and due process of law when a State Medical Board, sitting in judgment on the physician's license, is composed of at least two physician members who knew there existed reasonable medical evidence to show that the physician did not commit the abortion he stood accused of, and they did not disclose this evidence to the accused physician or to the other board members at the hearing;

5. Does a State Medical Practice Act which lists abortion as a ground for discipline (including Loss of License) of a physician, except after due consultation with another physician intrude upon the privacy of the patient-physician relationship and otherwise violate constitutional protections?

STATUTES AND REGULATIONS INVOLVED

1. AMENDMENT 5, CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. AMENDMENT 14, CONSTITUTION OF THE UNITED STATES:
"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. LOUISIANA REVISED STATUTES TITLE 37 SECTION 1285 (1950 as amended):
"The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate issued under this part for any of the following causes:

(6) Procuring, aiding or abetting in procuring an abortion unless done for the relief of a wom-

an whose life appears in peril after due consultation with another licensed physician; or . . ."

4. LOUISIANA REVISED STATUTES TITLE 14 SECTION 87 (As amended Acts 1964, No. 167): "Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:

(1) Administration of any drug, potion, or any other substance to a female; or

(2) Use of any instrument or any other means whatsoever on a female.

Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years.

STATEMENT OF THE CASE

Petitioner, a Physician in Jefferson Parish, Louisiana, was arrested on March 23rd, 1965, and formally charged with the Crime of Abortion (Title 14, Section 87, Louisiana Revised Statutes, as amended 1950. While awaiting trial on this criminal charge, which is a felony in Louisiana, the Louisiana State Board of Medical Examiners notified him of a Board hearing which would be held on May 1, 1965;

"on your moral and professional conduct; moral and professional competence; your alleged

> procuring, aiding or abetting and procuring one or more abortions or attempting same; prescribing of habit forming drugs in other than a legal and legitimate manner."[1]

On March 26, March 31, and April 1, 1965, a preliminary hearing was held in the Criminal Court of the 24th Judicial District Court on the charge of abortion against Dr. Knight. An attorney employed by the Sheriff and paid by the respondent Board appeared as Special Prosecutor in the preliminary hearing, and conducted the State's case against Dr. Knight. He later conducted the State's case in the trial of the criminal charge, where Dr. Knight was acquitted. This lawyer's services in this matter were employed and again paid for by the respondent Board and he assisted the counsel of the Louisiana State Board of Medical Examiners.

Dr. Knight, through his attorneys, requested that the hearing of the Board be postponed to a later date, because of the pending criminal charges filed against him in Jefferson Parish. This request was denied.

Dr. Knight's attorneys, then requested clarification of the "notice" he had received relative to the Board hearing, and he was told by telephone that the hearing would be limited to "those matters arising out of Dr. Knight's arrest on March 22 or 23".

The hearing of the Board was convened on May 1, 1965, and Dr. Knight, through advice of counsel, refused

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[1]Appendix p. 213

to testify because of possible self-incrimination. One of his attorneys again requested clarification of the charges and he was denied.

On May 5, 1965, Dr. Knight received a letter from the Board advising him that his license had been suspended for five years.

On May 19, 1966, Dr. Knight was tried before a jury in Criminal Court and found Not Guilty of the criminal charge of abortion previously filed.

Dr. Knight then applied to the Board for reinstatement of his license. His application was denied by the Board and Dr. Knight brought a civil action by which he sought, through mandamus or an alternate remedy, to have his license reinstated. Upon the trial of this case below it was learned that:

1. In January, 1965, one Charmaine Marthet, a pregnant female, contacted the respondent Medical Board and was referred to the private detective agency retained by the Board to investigate this petitioner. This agency, working with the Board and the Local Sheriff, allege[3] to have attempted to discourage her plans for an abortion.[4] This did not succeed and the sheriff then determined to use her in a plan to expose the respondent as he and the Board saw fit. This lady had been previously known to the Board as a witness against Dr. Knight when she had in December, 1964, first made,

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[3]R. p. 182
[4]P. p. 183

and then repudiated, a charge of abortion against him. It was upon these circumstances that the Board in January, 1965, failed to renew his license for that year although the respondent had tendered the fee and requested the usual re-issue.

2. Thus in the period, January-May, 1965, the respondent practiced with a suspended license more or less upon notice that his Board had him under investigation.

3. In early March, 1965, one or more Board members, one of the detectives employed by a detective agency retained by the defendant Board, and Charmaine Marthet (who was a convicted prostitute), agreed to a plan in which, in order to gather evidence against Dr. Knight, Marthet would ask the respondent to perform an abortion upon her, and, if he agreed, she would actually undergo the abortion. (Appendix p. 376).

4. One Cefalu, the Board's detective, took charge of the arrangements. He took her to get the tests necessary to establish pregnancy, to the sheriff's office in Jefferson Parish, and to a doctor to be examined before taking her to Dr. Knight's office. He gave her money to pay for the intended abortion (which she did not use) and he arranged for a baby sitter for her on the day of the intended abortion. Dr. Lyons (a Board Member) later made arrangements to have her admitted to Southern Baptist Hospital, as his special patient. (T.p.394).

5. On March 22, 1965, pursuant to this plan, Marthet entered the office of Dr. Knight. When she left the office, she told Cefalu and waiting sheriff's officers, that Dr. Knight had performed an abortion on her. (T.p. 111).

6. She was then re-examined by the same physician who saw her before she went to Dr. Knight's office, who reported a dilation of the cervix; (T.p. 191).

7. On March 23, 1965, on Marthet's complaint, Dr. Knight was arrested by the sheriff of Jefferson Parish and formally charged with the crime of abortion.

8. On March 23rd, Mrs. Marthet commenced to bleed, was placed in a hospital, was out on March 31st to testify at the preliminary hearing and did not go back in until April 3rd, which left three days unaccounted for. On April 6th, she delivered a dead male fetus. (T.p. 140).

9. Said fetus had been eviscerated terminating life, probably by instrumentation; was red in color and had not lived longer than 72 hours thereafter. (T.p. 477).

10. All of this was known by The Chairman of the Board and one other member at the time of the May 5th meeting, but was not then disclosed either to the other members of the Board or to the physician under examination and in jeopardy. (T. p. 448 through 461).

After the trial on the merits, the trial court rendered

judgment recalling and denying the writ of mandamus and injunction dismissing petitioner's suit.

On appeal by petitioner, the Fourth Circuit Court of Appeal affirmed the judgment of the trial court, and rehearing was denied, the Louisiana State Supreme Court refused review, and now petitioner seeks review by this Court.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED DUE PROCESS OF LAW

A) PETITIONER SHOULD NOT HAVE BEEN CALLED UPON TO TESTIFY BEFORE THE BOARD WHILE UNDER CRIMINAL CHARGES.

In the beginning of the respondent Board's investigation of Dr. Knight, it could have chosen to either prosecute him criminally under the existing Louisiana Abortion Statute (LSA-RS 14: Section 87, 1950 as amended), or to exercise the sanctions of the Medical Practice Act and discipline him and suspend his license as a physician, (LSA-RS, Title 37, Section 1285). Alternatively, of course, they could have done as they did, pursue both courses of action at the same time. This latter course of action, taken by the Board, is what this petitioner is complaining about. This court had a similar situation before it in *Garrity Vs. State of New Jersey*, 385 US 493 (1967) where the police officer defendants did not refuse to testify before the At-

torney General and their answers were later used by the State to convict them of crime. Here Doctor Knight refused to testify and his refusal was used to suspend his license. This is the opposite side of the *Garrity* coin. Either Doctor Knight could have testified and allowed the Board-paid prosecutor to discover his defense in the criminal trial then pending, or he could have done as he did, refuse to testify and lose his license. He was, in short, presented by the Board with a Hobson's Choice. Surely this meets the "substantial" test of *Cohen vs. Hurley*, 366 US 117, (1961) (at 129). Doctor Knight was not just "discouraged" from giving testimony by the looming trial, he was severely threatened by the Chairman of the Medical Board that refusal to testify would result in "a serious disappointment" by the Board.[5] Thus, if he did testify he might go to jail; if he did not, his professional standing was in serious danger. The meaning of the Chairman was clear to the Doctor; he could testify or so "disappoint" The Board that they would have no choice but to suspend him.

As Mr. Justice Harlan writes in *Cohen* at p. 126 and 127, the choice is even difficult for the State.[6] But the State cannot refuse to choose, since to pursue *both* the criminal and administrative remedies at the same time presents the defendant with a dilemma that cannot be constitutionally resolved. *Chambers Vs. State of Florida*, 309 US 227, 60 S. Ct. 472, 84 L. Ed. 716; *Blackburn Vs. State of Alabama*, 361 US 199, 206, 80 S. Ct. 272 4,

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[5]Appendix p. 21

[6]*Cohen vs. Hurley* (Supra) at p. 8.

L. Ed. 2d 242; *Leyra Vs. Denno,* 347 US 556, 74 S. Ct. 716, 98 L. Ed. 2d 948; *Haynes Vs. State of Washington,* 373 US 503, 83 S. Ct. 625, 17 L. Ed. 2d, 574. See also relative to coercion, *Miranda Vs. State of Arizona,* 384 US 436, 464-465, 86 S. Ct. 1602, 1623, 16 L. Ed. 2d 694. *Garrity Vs. State of New Jersey* (Supra).

"Where the choice is between the rock and the whirlpool, duress is inherent in deciding to 'waive' one or the other" *Union Pacific RR Co. vs. Public Service Comm.,* 284 US 67, 69-70, 39 S. Ct. 24, 25, 63 L. Ed. 131. See also *Stevens vs. Marks,* 383 US 234, 243-244, 86 S. Ct. 788, 793, and *Frost Trucking Co. Vs. Railroad Commissioners,* 271 US 583, 46 S. Ct. 605, 607, 70 L. Ed. 101.

Here the petitioner did not, as did the police officers in *Garrity* (Supra) succumb to compulsion, but as a consequence, (although he was later acquitted), he lost his license. This is just as much a watering down of the Fifth Amendment protection as the dissenters of this court have recognized in *Cohen Vs. Hurley,* 366 US 117, 81 S.Ct. 954 (1961), *Nelson Vs. County of Fla.,* 362 US 1, 80 S. Ct. 527 (1960), *Beilan Vs. Board of Ed. (Phila),* 357 US 399, 78 S. Ct. 1317 (1958), and *Lerner vs. Casey,* 357 US 468, 78 S. Ct. 1311(1958).

To put it as the obverse of *Garrity,* the State cannot, contrary to the Fourteenth Amendment,[7] use the

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[7]See *Malloy Vs. Hogan,* 378 US 1, 84 S. Ct. 1489, 12 L. Ed 2d 653, and *Spevack vs. Klein,* 385 US 311, 87 S. Ct. 625, 17 L. Ed 2d 574, overruling *Cohen vs. Hurley* (Supra) as to exemption of Members of the Bar from immunity Statutes. Louisiana has no immunity statute applicable here.

threat of jail to produce testimony before a State Board of Medical Examiners. That was what they were trying to do here, and it violates essential concepts of due process.

The Louisiana Board was very plain about this Doctor's Dilemma. Respondent's Counsel stated:

> MR. ZACCARIA:
> "If I may enlarge upon that in order to keep the record straight, it is not only because of the constitutional right afforded Dr. Knight because of the precarious position he may be in in Jefferson Parish facing criminal charges, but this also relates back to my earlier arguments about lack of notice. We may permit Dr. Knight to testify before this hearing is over, regardless of the impliçations in Gretna, but until we know, until we know what these allegations are and who are making them against him, I do not feel that it is basically fair to ask Dr. Knight to testify blindly."
>
> "This goes back to my original arguments. I just wanted to amplify our reasons for at this point asking Dr. Knight to not testify, under the Fifth Amendment, the fact that he might tend to incriminate himself. Thank you."

Doctor McMahon responded:

> THE CHAIRMAN:
> "Of course, that is Dr. Knight's privilege, but

> I must say that *the Board will be terribly disappointed if Dr. Knight doesn't,* because he is now appearing before five members of his own profession and for the purpose of determining certain medical facts, *and we will be terribly disappointed if Dr. Knight doesn't give this Board a full opportunity to hear his side of the controversy,* his own personal side outside of the legal factors, just from our own personal medical side of the problem." (emphasis added)

From this it is clear, the Doctor was being told that he had either to testify before the Board or lose his License. If he testified, he might well be handing the Board's special prosecutor all the evidence the jury would need to convict him of a felony. The language of *Spevak* (Supra) describes it better:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary to convict him * * *.' *United States V. White,* 322 U.S. 694, 698, 64 S. Ct. 1248, 1251, 88 L. Ed. 1542. As we recently stated in *Miranda V. State of Arizona,* 384 U.S. 436, 461, 86 S. Ct. 1602, 1620, 16 L. Ed. 2d 694, 'In this Court, the privilege has consistently been accorded a liberal construction.' It is in that tra-

> dition that we overrule Cohen v. Hurley. We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "No person ***** shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. Like the school teacher in *Slochower v. Board of Higher Education of City of New York*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692, and the policemen in *Garrity V. State of New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562,[3] lawyers also enjoy first class citizenship."

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[3]Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach.

Since the Board was in effect attempting a discovery proceeding in a criminal case, (a right not afforded The State in Louisiana) it becomes clear that when the Criminal Court Jury acquitted this petitioner it had lost its main thrust against him. Instead it chose to rely further on a hearing record where it was judge, jury, and prosecutor, and, where the defendant stood mute by necessity, as he was being deprived of his License.

This is an impermissable burden on the privilege. *In Re Gault*, 381 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, 559, (1962) *Thorp Vs. Housing Authority* 386 U.S. 670, 87 S. Ct. 1244, 18 L. Ed 2d 394, 400 (1967), *Haynes*

Vs. State Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513, (1963), *Culombe Vs. Connecticut,* 367 U.S. 568, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961), *Rogers Vs. Richmond,* 365 U.S. 534, 5 L. Ed. 2d 760, 81 S. Ct. 735, *Griffin Vs. California,* 380 U.S. 609, 14 L. Ed 2d 106, 85 S. Ct. 1229 (1965).

Finally, this court reached the inversion of *Garrity* (Supra) as posed by the facts of this case when it decided *Gardner vs. Broderick* _____U.S. _____, 88 S. Ct. 1913, _____L. Ed. 2d _____, (1968), and *Uniformed Sanitation Men Ass'n. Vs. Commissioner of Sanitation,* ____ U.S. ____, 88 S. Ct. 1917, ____ L. Ed. 2d _____, (1968). While in those cases the accused persons were discharged solely because they exercised the privilege, and here the Board took evidence, it is clear that the testimony received was the Board's testimony, from its own paid witnesses and elicited by its own counsel. In fact, part of the testimony related to a description of how The Chairman of The Board of Medical Examiners himself participated in the planning of the arrest of Dr. Knight, and in the latter treatment of the complaining witness, Mrs. Marthet, which he arranged for, after her alleged instrumention by petitioner.[8]

The real answer, however, as to how this case relates to *Broderick* and *The Sanitation Men's case* (Supra) is found in the remarks of The Chairman when the lawyers for Dr. Knight explained that he would exercise the privilege against self-incrimination.[9]

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[8]Appendix p. 448, through 451.
[9]op. cite. p. 10.

After this had been said in the beginning of the proceedings, there was very little Dr. Knight could offer in way of defense. The cross-examination conducted by his lawyers could hardly have been effective in the absence of his own testimony in contradiction of that offered by The Board. This is especially true since meaningful cross-examination of adverse witnesses can occur only in the context of contradictory evidence introduced as a base. In this case it was not there.

The conclusion that the recorded testimony forces upon the reader is that the Board Members had pretty well made up their minds after Dr. Knight plead the Fifth Amendment, and that what was left was the formal presentation of The Board's case. This was a performance bought and paid for by the examiners, which because of the pending felony trial, the accused Doctor could hardly dare to tamper with. With this assurance, the Board felt as free to suspend this physician as did The City of New York and its Sanitation Commissioner in *Broderick* and *Sanitation Men's Ass'n.* (Supra). The result should be the same as there; this defendant was suspended because he refused "to waive a right which the constitution guarantees to him".[10]

B) SIGNIFICANT EVIDENCE WAS WITHHELD FROM THE MEDICAL BOARD AT THE TIME OF THIS HEARING.

As to question No. Four, the Chairman and one other physician who were members of the Board, knew at

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[10] ***Gardner vs. Broderick*** **(Supra) at p. 1915 (S.Ct. Rep.)**

the time of the hearing that the dead fetus was delivered April 6th, 1965, 15 days after alleged abortion and that it exhibited characteristics which could reasonably lead a trained physician to conclude that the fetus had been killed by instrumentation within the 72 hours preceding its birth.[11] Nothing about this was said to the other Board Members or to Doctor Knight at the time of the Board hearing.[12]

The prosecutor owes a duty to the defendant in a criminal, as well as in an administrative hearing, to disclose all reasonable evidence of non-guilt. This is designed to meet his public obligation to seek punishment of those who appear to be guilty of crime, but also to protect those persons who may be innocent. The responsibility of a State Board armed with sanctions is first to the public, but also to those professionals within its jurisdiction. The suppression of such evidence is fatal to a due process prosecution. *United States Vs. Di-Re,* 322 U.S. 581, 68 S. Ct. 222, (1948), *Holland Vs. United States, 348* U. S. 121, 75 S. Ct. 127, (1955), *Bradey Vs. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), *Mooney Vs. Holohan,* 294 U.S. 103, 55 S. Ct. 340, (1935), *Pyle Vs. Kansas,* 317 U.S. 2B, 63 S. Ct. 177 (1942).

While some of the judges and accusers of this petitioner had knowledge of what happened to the alleged victim after her visit to petitioner's office 15 days prior to her delivery, he did not. Had he known, he would have been put on notice that such a defense was pos-

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[11]T.P. 472

[12]See entire record

sibly available and should be developed. Instead he was reduced to a fruitless cross-examination of adverse witnesses selected by the Medical Board. These facts raise a very serious question of due process. One cannot say with a certainty that the Board conspired to judge him in advance, or that another person or persons procured this abortion, but there cannot be much doubt that some members of The Board were not prepared for the full truth to be developed at the initial hearing.

The District Court and The Court of Appeals below (4th Circuit Louisiana) affirmed the findings of The Board of Medical Examiners as being based on "Substantial evidence" and as "not arbitrary or capricious".[13] However, where such Board findings are shown to be grounded on a short record, occasioned by withheld evidence that could reasonably lead to a different conclusion, then as a matter of law, due process is offended. Putting it another way, all the District Court and The Court of Appeals did was to judge the discretion of the Board. In doing so, it did not find an abuse. However, where the decision of The Board is tainted with a clear showing of important evidence being withheld, (and the record in The District Court clearly shows this),[14] then the Board cannot be given the usual weight afforded a finder of fact.

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[13]Appendix Part 3, p. 823

[14]Appendix Part One compared with Appendix Part Two.

II. THE STATE MEDICAL PRACTICE ACT IS UNCONSTITUTIONAL.

A) THE CHALLENGED STATUTE IS AN ARBITRARY INVASION OF THE RIGHT OF THE PHYSICIAN TO PRESCRIBE FOR HIS PATIENT IN ACCORDANCE WITH HIS BEST PROFESSIONAL KNOWLEDGE.

The State cannot restrict a licensed physician from freely prescribing the best care and from giving the best advice available to his patient. *United States V. One Package,* 86 F. 2d 737 (2d Cir. 1936); *Griswold V. Connecticut,* (Supra) at 381 U.S. 481; *United States V. Freund,* 290 Fed. 411 (D. Mont. 1923).[15]

In *United States V. One Package, (*Supra) the Court was considering the interpretation of a provision of the Comstock Act which prohibited the mailing of any item, the purpose of which was the "prevention of conception or for causing abortion," 19 U.S.C. 1305. It held in an opinion written by Judge Augustus N. Hand that this provision could not be interpreted as applicable to the licensed physician acting within the accepted medical practices of the day. It pointed out that it would be unreasonable to suppose that legislation was intended

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[15]Cf. the recent recognition that freedom of association is involved in professional-client relationships. *United Mine Workers v. Illinois State Bar,* 389 U.S. 217, 19 L. ed 2d 426, 88 S. Ct. 353 (1967); *NAACP v. Button,* 371 U.S. 415, 9L. ed 2d 405, 83 S. Ct. 328 (1963); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 12 L. ed 2d 89, 84 S. Ct. 113 (1964).

to prevent the supression of articles, "the use of which in many cases is advocated by such a weight of authority in the medical world" (pp. 739-740).

The physician's belief must coincide "with the average judgment of the doctors in the community in which he practices." *Commonwealth V. Wheeler,* 315 Mass. 394, 53 N.E. 2d 4 (1944). See Also *Commonwealth V. Brunelle,* 341 Mass. 673, 677, 171 N.E. 2d 850, 852 (1961).

B) THE CHALLENGED STATUTE IS AN ARBITRARY INVASION OF THE FUNDAMENTAL RIGHT OF A WOMAN TO DETERMINE WHEN TO BEAR OFFSPRING.

The challenged statute violates the private right of a woman to determine whether or not to bear a child by restricting her right to terminate a pregnancy, except, in the statute under consideration here ". . . a woman 'whose life appears in peril' ***". At the outset, it is established that the defendant-appellant here may challenge the statute as violative of the rights of his patients, as well as of his own. *Griswold V. Connecticut,* 381 U.S. 479, 481, 14 L. ed 2d 510, 85 S. Ct. 1678 (1965); *Barrows V. Jackson,* 346 U.S. 249, 257, 97 L. ed 1586, 73 S. Ct. 1031 (1952).

The fundamental right to determine whether to bear offspring should be within the scope of the increasing area of personal rights protected from unwarranted

state interference.[16] In the closely related area of the right of married persons to make this determination prior to conception by the use of contraceptives, the Supreme Court has struck down the Connecticut statute which forbade the dissemination of information and instruction as to the means of preventing conception, *Griswold V. Connecticut,* (Supra). The recognition in *Griswold* that there are fundamental rights not specifically enumerated in the Constitution, but demanding the same degree of protection against state interference with privacy carries forward to yet another area, the Court's recognition that non-enumerated rights are of equal importance constitutionally to those specifically set out in the Bill of Rights (381 U.S. at 484):

"The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe V. Ullman,* 367 U.S. 497, 516-522, 6 L. ed. 2d 989, 1003-1007, 81 S. Ct. 1752 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against

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[16] *Cox, Constitution Adjudication and the Promotion of Human Rights,* 80 Harv. L.R. 91 (1966):

> "Today the political theory which acknowledges the duty of government to provide jobs, social security, medical care and housing extends to the field of human rights and imposes an obligation to promote liberty, equality and dignity. For a decade and a half, the recognition of this duty has been the most creative force in Constitutional law."

the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'. The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be contrued to deny or disparage others retained by the people.'

"The Fourth and Fifth Amendments were described in *Boyd v. United States,* 116 U.S. 616, 630, 29 L. ed 746, 751, 6 S. Ct. 524, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp V. Ohio,* 367 U.S. 643, 656 6L. ed 2d 1081, 1090, 81 S. Ct. 1684, 84 ALR 2d 933, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' See *Beaney, The Constitutional Right to Privacy,* 1962 Sup Ct. Rev. 212; Griswold, *The Right to be Let Alone,* 55 NY LR Rev. 216 (1960).

"We have had many controversies over these penumbral rights of 'privacy and repose.' (Citing cases) These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."

C) THERE IS NO COMPELLING STATE INTEREST SUFFICIENTLY STRONG TO JUSTIFY THE PROHIBITION OF ABORTION BY A LICENSED PHYSICIAN ON A WOMAN WHO DESIRES THE ABORTION.

The strength, depth and significance of the personal right of the woman and the professional right of the doctor drastically curtailed by the abortion law far outweigh the alleged value to society adverted to in support of the abortion law.

The principle applicable to the examination of this statute has been stated by the United States Supreme Court in *Bates V. Little Rock,* 361 U.S. 516, 524, 4 L. ed. 2d 480, 80 S. Ct. 412 (1960):

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (Citing Cases)

See also *NAACP V. Button,* (Supra) at p. 421.

Can any asserted compelling state interest in the present statute survive scrutiny? The abortion statutes in the form that they now appear Article 87 (Title 14, as amended) and in most states to the contrary, had their origin in the social attitude of mid-Victorian morality prevalent in the second half of the nineteenth century, during which these laws were passed. Common law was not so strict, since it viewed abor-

tions as illegal only after quickening, which occurs only after the first trimester. The alleged sovereign interest in preventing abortions prior to quickening is a relatively recent development in western history and in Anglo-American law,[17] and can hardly be said to have been recognized universally in our civilization or since ancient time.[18]

One asserted interest of the state is a concern with preserving the health of the woman because of the medical dangers of abortion. Whatever may have been the medical facts at the time of the passage of the law, there is no evidence on which a present-day finding could justifiably be made that abortion by a licensed physician constitutes a grave, or indeed any, danger to health. It has been repeatedly established that abortions performed by licensed physicians under appropriate conditions constitute as little danger to health as a minor operation. Certainly there is no danger[19] of the dimension which would justify the almost total infringement of individual liberty incident to the present prohibitions.

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[17]See, for summaries of the history of abortion in Western and Anglo-Saxon law: Commentary on Draft No. 9 of the Model Penal Code, footnote 12, p. 148; Williams, *The Law of Abortion*, 5 Current Legal Problems 128 (1952).

[18]The view embodied in the abortion laws of the United States is hardly a world-wide view. Many other countries of the world permit abortions at will; even more, on very broad grounds. See Roemer, *Abortion Law; The Approaches of Different Nations*, 57 American Journal of Public Health 1906.

[19]Hardin, Garrett: *Blueprints, DNA and Abortion: A Scientific and Ethical Analysis*, 32 Medical Opinion and Review 74.

This statute is indeed an example of over-breadth, for even recognizedly necessary state regulation must not be unnecessarily broad and thereby invade areas of protected freedoms. *Aptheker V. Secretary of State,* 378 U.S. 500, 514, 12 L. ed 992, 1001, 84 S. Ct. 1659; *NAACP V. Alabama,* 377 U.S. 288, 307-308, 12 L. ed 325, 338, 84 S. Ct. 1302; *McLaughlin V. Florida,* 379 U.S. 184, 13 L. ed 222, 85 S. Ct. 283 (1964); *Griswold V. Connecticut* (Supra) 381 U.S. at 498.

D) THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ON ITS FACE AND IN ITS APPLICATION.

The Louisiana Medical Practice Act involved in this action is invalid on its face as against anyone outside its protected class (of women for whom an abortion is necessary to preserve life) because the legislative classification cannot be supported as justifiable in the light of a legitimate legislative interest. The statute therefore violates the equal protection clause of the Fourteenth Amendment. Although in recent years the clause has been utilized most often with respect to racial discrimination, the equal protection clause is available for protection against irrational discrimination in any form.[20] And, in determining whether the discrimi-

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[20]See e.g., *Griffin v. Illinois,* 351 U.S. 12, 100 L. ed 891, 76 S. Ct. 585 (1956); *Douglas v. California,* 372 U.S. 353, 9 L. ed 2d 811, 83 S. Ct. 814 (1963); *Long v. District Court,* 385 U.S. 192, 17 L. ed 2d 290, 87 S. Ct. 362 (1966); *Reynolds v. Sims,* 377 U.S. 533, 12 L. ed 2d 506, 84 S. Ct. 1362 (1964); *Lucas v. Forty-*

nation is irrational, the Court will ensure, as stated in *Levy V. Louisiana,* 391 U.S. 68, 20 L. ed 2d 436, 88 S. Ct. 1509, L. Ed at 469 (1968), that the sensitive area of civil rights receives priority in the constitutional scheme when weighed against an asserted state interest, no matter how long-standing and traditional.

The concept of equal protection is not a static one and a challenged statute must be examined in light of current knowledge. As the Supreme Court of the United States said in *Harper V. Virginia State Board of Elections,* 383 U.S. 663, 16 L. ed 2d 169, 86 S. Ct. 1079, at 383 U.S. 669, et seq.:

"We agree, of course, with Mr. Justice Holmes that Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics' . . . Likewise, The Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy V. Hogan,* 378 U.S. 1, 5-6."

"Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate pub-

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Fourth General Assembly, 377 U.S. 713, 12 L. ed 2d 632, 84 S. Ct. 1472 (1964); *Carrington v. Rash,* 380 U.S. 89, 13 L. ed 2d 675, 85 S. Ct. 775 (1964); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 16 L. ed 2d 169, 36 S. Ct. 1079 (1966).

lic facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands . . . . . Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When in 1954 — more than a half-century later — we repudiated the 'separate-but-equal' doctrine of *Plessy* as respects public education we stated:

'In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy V. Ferguson was written.' "

The lack of justification is accentuated by the demonstrated social fact that the actual application of the abortion law is wholly discriminatory in favor of the rich and mobile and against the poor and depressed. The United States Supreme Court is increasingly developing the thesis that the equal protection clause requires equality for rich and poor. It has applied this principle in decisions dealing with elections and representation in the Legislature (*Gray V. Sanders,* 372 U.S. 368, 9 L. ed 821, 83 S. Ct. 801 (1963); *Westberry V. Sanders,* 376 U.S. 1, 11 L. ed. 2d 481, 84 S. Ct. 526 (1964); *Reynolds V. Simms,* 377 U.S. 533, 12 L. ed. 2d 506, 84 S. Ct. 1362 (1964); to invalidate the requirement of a poll tax as a prerequisite to voting *(Harper V. Virginia Board of Elections,* (Supra) at 663) in imposing the obligation to supply counsel at public expense to paupers charged with serious crimes *(Gideon V. Wainwright,* 372 U.S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792

(1963)), and in requiring the state to furnish a transcript on appeal to indigent defendant (*Griffin V. Illinois,* 351 U.S. 12, 100 L. ed 891, 76 S. Ct. 585 (1956)). This court may properly examine the sociological effect of the actual operation of a statute in determining its constitutional validity. *Brown V. Board of Education,* 347 U.S. 483, at p. 492, 98 L. ed 873, 74 S. Ct. 686 (1954).

E.) THE STATUTE IS A LAW RESPECTING AN ESTABLISHMENT OF RELIGIONS IN VIOLATION OF THE CONSTITUTION BECAUSE THE PRIMARY PURPOSE OR EFFECT IS THE ADVANCEMENT OF A RELIGIOUS DOGMA.

The most recent pronouncement of the Supreme Court of the United States has reiterated the proposition that if the purpose or primary effect of the enactment is the advancement or institution of a religious dogma, then the enactment exceeds the scope of legislative power. *Epperson V. Arkansas,* ____ U.S. ____, 89 Sup. Ct. 266, ____ L.Ed. 2d ____ (1968). In that case the Court held that the Arkansas Statute, which whether it prohibited mention of Darwin's theory or only forbade teaching of it, was unconstitutional because of its conflict with the prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The Court said:

"Government in our democracy, state and na-

> tional must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." 89 Sup.Ct., at 270.

Prior to *Epperson,* in *Abington School District v. Schempp,* 374 U.S. 203, 10 L. ed 2d 844, 83 S. Ct. 1560 (1963), the Court reviewed the foregoing cases and drew from them the governing standard:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education* (supra) . . . . *McGowan v. Maryland* (supra)." 374 U.S. at 222.

The foregoing cases are the most notable recent expositions of the proposition advanced by an eminent authority that.

> "Contemporary constitutional doctrine may suggest yet another, related difficulty about obscenity and other morality laws. For the morality that these laws would protect can trace a discernible path back to origins in religious authority. Can government, which may not establish religion, or interfere with the free exercise of religion and non-religion, enforce a morality rooted in religion? Is legislation the sole or chief purpose of which the preservation of a quasi-religious morality, consistent with the separation of Church and State now recognized as the law of the Constitution."[21]

The crucial question under the *Epperson and Abington* doctrines then is whether the purpose or primary effect of the state abortion laws at the present time is the advancement or inhibition of religion, or of general social interests which demand the pervasive state regulation. We have discussed above the various other purported state interests which have been mentioned as being the primary purpose of the laws and shown that there is indeed no substantive state interest of sufficient consequence to justify the regulation. What appears to be a primary justification advanced for the present laws is a religious and not a secular one and, therefore, cannot be relied upon to validate what is in effect the legislation of a religious philosophy. There is a very substantial evidence that the present maintenance of the abortion laws is based upon the current

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[21]Henken, *Morals and The Constitution: The Sin of Obscenity,* 63 Col. Law Rev. 391, 407, 410 (1963).

religious position of particular church groups, that the laws are required to protect the life of the fetus, which these groups maintain, arises at the moment of conception. The primary organized opposition to reforming abortion legislation comes from these particular religious groups and the form of the opposition is a restatement of theological doctrine.[22]

CONCLUSION

Wherefore, it is respectively requested that the Writ of Certiorari herein prayed for be granted and that this court review the decision below and reverse the action suspending petitioner's license or remand the matter to the Supreme Court of the State of Louisiana with an order directing them to review this record in light of the points herein raised.

Respectfully submitted

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22Leavy, Zad and Kummer, Jerome M., *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 Ohio State Law Journal, 647 at 659, et seq. (1966).

CERTIFICATE

I, Benjamin E. Smith, counsel of record for the petitioner, certify that a copy of this application has been served by United States Mail on Mr. Thomas J. Wyllie, counsel for the Louisiana State Board of Medical Examiners, this _____ day of February, 1969.

BENJAMIN E. SMITH

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No.

SIDNEY C. KNIGHT, M.D.

versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

MAY IT PLEASE THE COURT:

Petitioner seeks review by certiorari of a decision rendered by a state medical licensing authority which suspended his license to practice medicine for statutory cause found to exist after an administrative hearing.

Respondent, the Louisiana State Board of Medical Examiners, opposes his application for a writ of certiorari on the grounds that no federal question of substance, properly presented to the lower courts for adjudication, was decided contrary to applicable decisions of this Honorable Court and, on the further ground, that the administrative and judicial proceedings in-

volved were conducted in the accepted and usual manner so as to adequately provide the petitioner with the protection afforded by the Federal Constitution.

Respondent therefore respectfully submits that the cause presented need not be reviewed by this Honorable Court and that the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

The factual and legal issues raised by this administrative decision have been heard and reviewed by many courts during the course of the proceedings which started in 1964 and which have continued to date. Respondent therefore feels that a more complete statement of the case should be presented to this court for consideration.

During the year 1964, because of numerous complaints made to it, the Louisiana State Board of Medical Examiners was conducting an investigation into alleged abortion activities in this area involving medical practitioners. (T.R. 49).

Information was received concerning Dr. Knight's involvement with alleged abortions on several women. (T.R. 38, 53, 56, 101).

In March of 1964, the Board of Medical Examiners held a formal hearing regarding an alleged abortion by Dr. Knight on a girl named Mary H. This hearing was conducted with Dr. Knight present and represented

by counsel. The Board did not suspend his license because insufficient evidence was put before them. The girl was not available for testimony because she had left the state. Shortly thereafter, the Grand Jury returned a finding of no true bill on the same charge. (T.R. 34, 93, 103).

Dr. Knight's 1964 renewal license was placed on probationary status as a result of the information received by the Board up to that time. However, this status in no way interferred with his right to practice medicine in the State of Louisiana. (T.R. 35).

In December of 1964, the Board also scheduled a hearing involving an alleged abortion by Dr. Knight on Charmaine Marthet, an admitted prostitute. The formal hearing was cancelled when the Board received an affidavit allegedly made by Miss Marthet, transmitted by the attorneys then representing Dr. Knight, which affidavit purportedly denied her previous allegations. (T.R. 51).

Instead of holding a hearing on charges against Dr. Knight at that time, the Board simply received information from various witnesses, including Miss Marthet, as to their knowledge of abortion activities involving doctors in the area and also information concerning the statement previously received. (T.R. 51, 56).

No action whatsoever was taken against Dr. Knight's license as a result of the information received at that time. (T.R. 93). Dr. Knight failed to renew his license

in 1965 by satisfying the condition precedent of paying the renewal fee as required by Louisiana Revised Statutes 37:1280, (T.R. 94), therefore, no 1965 renewal license was sent to him. However, the Board did not take action in accordance with Louisiana Revised Statutes 37:1280 to suspend his license for failure to properly renew.

During the course of the continuing investigation by the Board, an investigator was informed by Miss Marthet in the latter part of February, 1965, that she was again pregnant, and that she intended to go to Dr. Knight for another abortion. (T.R. 57).

This situation did not involve the same pregnancy which was questioned in December of 1964. (T.R. 94).

The investigator was advised to obtain evidence, if possible, (T.R. 57), and to inform the Jefferson Parish authorities of the girl's intention. (T.R. 183).

Attempts were made to dissuade the girl from her expressed purpose by the investigator and the parish authorities, which included advising her father of the situation. (T.R. 154, 182, 184).

These attempts were unsuccessful, and therefore, the Parish authorities made arrangements to properly document the evidence should the abortion actually be committed. (T.R. 183).

Miss Marthet's pregnancy was confirmed by medical examination (Board Record 149, 150) and by lab-

oratory tests. (Board Record 132).

On March 22, 1965, the day of the abortion, she was also examined by a deputy coroner of Jefferson Parish in order to document her physical condition immediately prior to her visit to Dr. Knight's office. (Board Record 182, et seq.).

She was then accompanied by the parish authorities from the coroner's office to Dr. Knight's office and was called by him into a private examining room. (Board Record 96, *et seq.*).

Immediately upon leaving the doctor's office, she was once again returned to the same deputy coroner in the company of the parish authorities, who had kept her under constant surveillance in order to properly document her activities. (Board Record 96, *et seq.*)

The deputy coroner again examined her and found changes in her cervix which he stated were consistent with instrumentation and, in fact, in his opinion, could only have been the result of instrumentation occurring within the three-hour period since his first examination. (Board Record 185, 194).

She was then returned to her home, where some eight hours later she began to hemorrhage. She was advised to elevate her legs and to use ice packs to see if the hemorrhaging would stop. (T.R. 176).

Her condition did not improve, and she was therefore admitted to Baptist Hospital, where her condition was initially diagnosed as acute pelvic inflammatory disease and possible incomplete abortion. (See Exhibit R. 4).

On the morning of the 23rd, upon her admission into the hospital, she was examined by the same doctor who had originally confirmed her pregnancy, and he also noted changes in her cervix similar to those noted by the deputy coroner. (Board Record 151, Exhibit R. 4).

The Jefferson Parish authorities arrested Dr. Knight on the criminal charge of abortion on March 23, 1965.

While in the Baptist Hospital, the girl received medical treatment and the process of expulsion of the fetus was apparently arrested by medical care and she was therefore released from the hospital on March 31, 1965. (Exhibit R. 4).

Upon her release from the hospital on March 31, 1965, she was taken directly to the courtroom to testify in the preliminary hearing on the criminal charges against Dr. Knight. (T.R. 181).

During the preliminary hearing, Dr. Knight was fully advised of the charges against him and the evidence giving rise to his arrest was revealed to him. His attorneys at that time had a full opportunity to cross-examine and explore the facts giving rise to his arrest. The court reached a finding of probable cause for his arrest, and Dr. Knight was bound over for trial on the charge of criminal abortion.

After Miss Marthet's testimony was given at the preliminary hearing, she was then taken directly to the Convent of the Good Shepherd, where the Sheriff had made previous arrangements for her to stay for her personal protection. (Board Record 42).

Miss Marthet remained in the convent until April 3, 1965, at which time she began to hemorrhage once again and was readmitted to the hospital with a provisional diagnosis of septic incomplete abortion. (Exhibit R. 4, second admission).

On April 6, a dead three-and-one-half month old fetus was expelled. The products of the womb were examined in the normal course of hospital procedure and reported in the pathology section of the hospital record. (Exhibit R. 4).

The Board then decided that, a hearing should be held in order to determine whether or not any action should be taken by the Board. The Board sent Dr. Knight notice of the setting of a formal hearing to consider the matter and advised him of the charges that would be heard against him. (Board Exhibit 3).

Dr. Knight, through his counsel, petitioned the Civil District Court for the Parish of Orleans for an injunction staying the scheduled Board hearing because of the pendency of criminal proceedings still to be heard. The Court denied a temporary restraining order and set the hearing on the preliminary injunction on a date subsequent to the Board's scheduled hearing. (Board Exhibit 6).

Dr. Knight's counsel then requested more particulars of the charge being brought against him in the Board's hearing. These particulars were provided and the hearing was limited by stipulation to those matters arising out of Dr. Knight's arrest on March 23, 1965. (T.R. 17-20).

The formal hearing by the Board was held and a verbatim transcript was made of the testimony received. (Board Exhibit 8). This testimony has been summarized by counsel and is attached hereto for the convenience of the Court as Exhibit A.

The Board then met to review the transcript and to consider the evidence. After due consideration, they unanimously voted to suspend Dr. Knight's license and to send out the proper notices of their decision. (T.R. 25-27).

Dr. Knight continued to practice medicine even though his license was suspended. Furthermore, he did not seek any type of judicial review from the administrative proceedings. The Board instigated proceedings in the 24th Judicial District Court for the Parish of Jefferson to obtain an injunction against his practice until his license was properly reinstated. A preliminary injunction was granted. (Board Exhibit 16).

The trial court denied the right to suspensive appeal from the preliminary injunction and Dr. Knight thereafter appealed to the Fourth Circuit Court of Appeals, which appeal was denied.

Dr. Knight then stood trial on the criminal charges brought against him by the state, and the jury therein returned a verdict of "Not Guilty".

The civil injunction proceedings in the 24th Judicial District Court for the Parish of Jefferson were then assigned for hearing on the merits, but this hearing was continued at the request of Dr. Knight's counsel of record in order to permit amendment of their pleadings. This matter is still pending and has not been reset by Dr. Knight.

Dr. Knight then instigated proceedings in the Civil District Court for the Parish of Orleans praying for a writ of mandamus, injunction, and in the alternative, for trial de novo. This was the first judicial review sought by Dr. Knight of the administrative proceedings which resulted in the suspension of his license. The request for such review came subsequent to his acquittal on the criminal charges. The Board filed exceptions to these proceedings, and the trial court sustained an exception of lis pendens on the grounds that the same factual and constitutional issues were raised in the prior preliminary injunction hearing in the 24th Judicial District Court, wherein issues of notice and due process along with the constitutionality of the Medical Practice Act pertaining to administrative suspension were raised. An appeal was taken after denial of a rehearing. The Fourth Circuit Court of Appeals remanded the case for a rehearing on the merits by the lower court.

The petition for a writ of mandamus, injunction, and in the alternative, for trial de novo, was heard on the merits in the form of a trial de novo by the Senior District Judge for the Parish of Orleans. All of the factual and legal issues raised by the pleadings were heard during the course of a five-day trial during which testimony was received from eighteen witnesses called by Dr. Knight and two witnesses called by the Board of Medical Examiners.

Judgment was rendered on April 13, 1967, ordering that the alternative writ of mandamus and injunction be recalled and that the relator's suit be dismissed.

The trial judge rendered written reasons for his judgment, holding that notice to Dr. Knight was adequate; that the charges against the Board raised in his petition were without foundation; that Dr. Knight failed to prove any conspiracy or manufacturing of evidence against him, that the Board's action was not arbitrary and capricious in suspending his license; and that the court was convinced that Dr. Knight did in fact perform an abortion on Miss Marthet on March 22, 1965.

In its written reasons for judgment, the court also disposed of other allegations contained in Dr. Knight's supplemental petitions and specifically rejected the several constitutional issues contained therein. A copy of the reasons for judgment is attached hereto for the convenience of the court as Exhibit B.

Dr. Knight subsequently appealed to the Fourth Circuit Court of Appeals, who, under Louisiana law, reviewed both the facts and the law presented by the hearing on the petition for the writ of mandamus. The Court of Appeals affirmed the decision of the trial court on June 10, 1968, and a rehearing was denied on July 1, 1968. This decision is reported as *Knight v. Louisiana State Board of Medical Examiners,* 211 So. 2d 433. An application was made for writs of review to the Louisiana State Supreme Court, which application was denied on October 25, 1968. This is reported at 214 So. 2d 716.

I.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW

Petitioner alleges that his constitutional right to due process of law was denied because he was asked to testify before the Board in administrative proceedings while criminal charges were pending against him in criminal court and because significant evidence was withheld from the Board at the time of the administrative hearing which, if revealed, would have inured to his benefit.

A.

SELF-INCRIMINATION

In discussing this issue in brief, petitioner asserts the conclusion that the mere fact that he was asked to testify before the Board and that they were disappoint-

ed in his refusal is indicative of the fact that the Board had made up its mind about his guilt on the basis of his exercising his constitutional right to remain silent. This conclusion simply is not warranted and is in fact refuted by the mass of oral and documentary evidence taken by the Board and the opportunities afforded by them to petitioner to take additional time to present his defense or evidence in rebuttal, both of which were refused by the petitioner. Perhaps a far more reasonable, or at least equally fair, inference to be drawn from this circumstance is that a defense simply was not available for presentation.

It is not mandatory that administrative process be stayed during the pendency of criminal proceedings. The administrative process simply has to respect the individual's right to remain silent and to reject an inference of guilt from his silence.

A complete review of the administrative proceedings will illustrate the Board's attitude on this issue.

The Board was instructed by its counsel as to petitioner's right to remain silent in order to avoid self-incrimination.

Petitioner's attorney likewise commented on this constitutional right. Following this, the Chairman of the hearing simply expressed his desire to obtain as much information as possible to facilitate determination of the factual and medical issues presented.

An expression of hope that a colleague will provide them the full opportunity to hear his side of the story does not in itself indicate the imposition of any penalty for silence or an unwillingness to recognize the legal presumption in favor of the accused. Furthermore, an expression of disappointment in the event of the choice to remain silent is not conclusive of prejudice or indicative of professional coercion or compulsion to testify.

The Board is composed of doctors who simply indicated a desire to hear their colleague's side of the story before attempting to reach a decision that would have a far-reaching effect on his professional standing.

This attitude is further illustrated by the Board's offer to afford additional time to petitioner for the development of evidence in his defense or in rebuttal to that already presented to the Board. (See Board Proceedings, P. 15, 16, 209). Such an attitude certainly does not reflect a disregard for the petitioner's position, but shows, on the other hand, a willingness to afford him every opportunity to adequately present his position. This opportunity was declined by petitioner, who chose instead to rest his case and to submit the matter.

The situation presented by this case is completely different from the circumstances involved in the principal cases cited by petitioner in his brief. (See *Gardner v. Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men Association v. Commissioner of Sanitation,* 392 U.S. 280 (1968); *Spevack v. Klein,* 385 U.S.

311 (1967); *Garrity v. State of New Jersey*, 385 U.S. 493 (1967).

In the instant case, the Board went to great lengths to receive sufficient evidence to permit a reasonable decision on the facts with or without petitioner's testimony. Two police officers, a deputy coroner, two independent physicians, and the complaining witness were all heard and cross-examined.

This is totally different from a suspension based upon a mere refusal to testify. In short, the suspension of petitioner's license was not based upon his refusal "to waive a right which the constitution guarantees him", (Gardner v. Broderick, *supra.*) but was based instead on independent evidence establishing that just cause in fact existed for such suspension. Therefore, the issue raised by petitioner simply is not present in this case.

To say that the testimony of the various witnesses heard was the Board's own testimony, from its own paid witnesses, is to disregard reality and once again to allege that "the Board conspired to manufacture evidence against him", an allegation that was rejected by both the trial and the appellate court in their review of both the administrative hearing and the facts presented at the mandamus proceedings where such allegation was originally made.

Petitioner complains that the parallel proceedings against him under criminal law and administrative process put him in an impossible situation relative to

his constitutional right to avoid self-incrimination. He states that this precluded a presentation of his defense. However, it must be remembered that the administrative proceedings received judicial review in the mandamus proceedings *subsequent* to his acquittal on the criminal charge. At this time, petitioner was not in the position he complains of; the danger of self-incrimination had passed. The mandamus proceedings took five days of the court's time during which petitioner called eighteen witnesses to the stand on his behalf. An examination of that record will show that he utilized every possible factual defense available.

He attempted to show that evidence of abortions other than the one on March 22, 1965, were considered by the Board and that the Board, based on its previous information of his activities, had already made up its mind concerning his guilt before the hearing was held. He has raised inferences that all of the actions against him were the result of political jealousy and that coercion was used against one of the doctors to force testimony favorable to the Board's desires. He questions the probability of certain medical facts heard by the Board and has attempted to smear the reputation of several of the medical witnesses appearing for the Board.

However, one significant fact remains paramount through all of his efforts to attack the Board's proceedings. Although he has requested affirmative relief of an extraordinary nature, after the danger of self-incrimination had passed, he did not see fit to take the stand in those proceedings on his own behalf

to explain openly and candidly to that court what actually did happen insofar as he was concerned. The only reasonable inference that can be drawn from this situation is that any testimony he could have given that court would have been unfavorable to his own position. Surely, after having been presented this opportunity to defend himself, which was rejected, it cannot reasonably be said that his constitutional guarantees were not adequately protected.

It is therefore respectfully submitted that the issues raised in brief on this point do not raise a federal question of substance and that the proceedings involved were conducted in a manner which provided petitioner with the protections guaranteed to him by the constitution.

B.

WITHHOLDING EVIDENCE

Petitioner's initial argument under this heading implies that the Board sitting as an administrative tribunal did not constitute a fair and impartial tribunal because, allegedly, two members of the Board had knowledge of the evisceration of the fetus and withheld this information from the rest of the Board.

Suffice it to say that the exact description of the fetus, including the evisceration and its color, were fully described in the pathology reports contained in the hospital records submitted into evidence to the Board at the hearing. See Board Record P. 144, and

the pathology report in the hospital record identified as R. 4.

Furthermore, this argument implies that the Board ignored part of the evidence before it without any proof to support such an implication. The law presumed that a Board will reach a decision on the basis of the evidence put before it. *Simmons v. Pure Oil Co.*, 241 La. 592, 129 So.2d 786 (1961). There simply was no evidence whatsoever to the contrary.

Petitioner's argument attempts to isolate several pathological facts and to draw ultimate facts from them allegedly showing that petitioner had nothing to do with the abortion and that the instrumentation occurred at a later date. However this argument is faulty in two respects. First of all, it attempts to reach an all-encompassing conclusion from a few isolated facts, and secondly, it ignores the totality of the other evidence which clearly indicates instrumentation by petitioner on March 22 to be the cause of the expulsion of the fetus on April 6.

The Board did not consider only isolated facts or events. It considered a set of facts and circumstances in toto, and upon this made its decision. The fact that the record of the hearing is over 200 pages and that it was only after having this typed and reviewing it that the Board made its decision indicates that the members of the Board considered the entire set of circumstances and considered it with great care.

A reading of the transcript shows the following uncontroverted factual picture. Miss Marthet (now Mrs. Smith), then pregnant, intended to seek an abortion from Dr. Knight. She advised an investigator and the parish sheriff's office of her intention. Since the girl was determined to obtain the abortion, appropriate arrangements were made to document the evidence of the act if it, in fact, occurred. Her pregnancy was confirmed and her physical condition recorded prior to her visit to the petitioner. This examination revealed a pregnant uterus in its ordinary closed condition. Her visit to petitioner's office immediately subsequent to the initial examination was corroborated by the sheriff's office. She was under surveillance by the sheriff's office except for the time she was actually in the petitioner's examination room. She was examined immediately following her visit to petitioner's office, and her condition revealed a change in the cervix in that a slight dilation had occurred. The girl also gave a history of being probed by petitioner while in his office. Later that night the girl began to hemorrhage badly and was admitted to the hospital where it was observed that her cervix had continued to dilate. Treatment at the hospital resulted in a decrease in her symptoms, and she was therefore discharged. She was accompanied directly to the criminal court to testify at the preliminary hearing against petitioner and from there was placed in a convent by the sheriff for her protection, where she remained until her symptoms reappeared, necessitating additional hospital care. Three days later in the hospital she delivered a stillborn male fetus.

The girl's testimony as to her activities relative to petitioner were corroborated, and medical testimony was given by the examining physician, to the effect that the change in the appearance of the cervix during the interval between the first examination prior to the visit to petitioner's office and the second examination immediately subsequent thereto was consistent with deliberate instrumentation, and that he could not conceive of any cause other than instrumentation which would have caused the change in the physical appearance of the uterus in the time period between the two examinations.

Presented this factual picture, uncontradicted by any other evidence, it is certainly reasonable for the Board members, who considered this not as ordinary laymen, but as physicians, to reasonably conclude that an abortion had in fact been accomplished by petitioner, and therefore that just cause existed under the Medical Practice Act for the suspension of his license.

From the foregoing, it is apparent that petitioner's statement of the case is in error as to the evidence submitted relative to the condition of the uterus, the knowledge of the Board as to such condition, and most importantly, about the three days allegedly unaccounted for.

Petitioner raises the spectre of instrumentation at another time and by another person other than himself in an effort to avoid the conclusion reached by the Board and apparently desires to ignore the facts relative to the obvious changes in the cervix caused by

dilation and the fact that the girl was in a convent during the three-day period referred. He apparently relies instead on a medical inference drawn from the description of the state of the fetus and several other isolated medical facts. It was just such an argument that was presented by petitioner in the mandamus proceeding.

In the mandamus proceeding, petitioner attempted to show that the medical evidence was manifestly incredible, particularly that given by Drs. Parker and Fowler, and that such evidence would not reasonably support a finding that he had committed an abortion by instrumentation on March 22, 1965.

He attempted to attack the testimony and evidence through the use of Dr. Eugene Countiss, called as an expert witness on his behalf. Petitioner's efforts along this line consisted of the isolation of several factors, such as the lack of immediate bleeding, which were presented to Dr. Countiss for consideration in the hopes that his opinion would weaken the probative value of the findings of the two doctors who had testified at the hearing.

However, when presented with the complete factual circumstances as considered by Dr. Parker, Dr. Countiss' opinion completely supported the opinion stated by Dr. Parker. He, too, felt that instrumentation was the most probable cause of the change in the physical findings observed by Dr. Parker.

More significantly, when given a lengthy hypothetical question based on all of the evidence which the Board had before it on May 1, 1965, he supported the Board's conclusion as the only reasonable one. Thus, petitioner's own expert proved that the Board was not arbitrary. It certainly cannot be said that the Board's conclusion that an abortion had been committed by Dr. Knight was plainly contrary to the facts or unsupported by evidence.

The Fourth Circuit Court of Appeals commented on the validity of this argument in the following manner.

> "Dr. Knight was charged with committing an abortion. The evidence overwhelmingly supports the conclusion he did perform an abortion on Mrs. Smith as he was charged. Although on the trial of this mandamus, he attempted to establish by expert testimony that the medical facts recited to the Board were preposterous, and the Board composed of physicians well knew the medical evidence did not support its conclusion that he had performed an abortion, his own expert witness testified the Board's conclusion was reasonable. Apparently, plaintiff failed to give the entire history of Mrs. Smith to his expert. However, on cross-examination, defense counsel propounded a hypothetical question based on the medical facts recited hereinabove, and the plaintiff's expert agreed it was reasonable to conclude there was an abortion as the result of instrumentation."

Furthermore, the trial judge in the mandamus proceedings summarized his thoughts on the facts presented to him by commenting in his opinion as follows:

> "The record of the hearing before the Louisiana State Board of Medical Examiners and the evidence in this case fail to show that the Board's position was arbitrary or capricious. *The testimony before the Board and in this mandamus action leaves no doubt that Dr. Sidney C. Knight did perform an abortion on Charmaine Marthet* [Smith] *on March 22, 1965.*" (Emphasis and marital name added.)

It is therefore clear that the Board's decision was not grounded on a "short record" and that important evidence was not withheld from it. When petitioner's own expert witness was presented with the entire factual medical picture, he too agreed with the Board's position that the expulsion of the fetus was due to instrumentation by the petitioner.

It is therefore respectfully submitted that the allegations and arguments raised in this syllabus point by petitioner are simply not supported by the facts in the record.

II.

CONSTITUTIONALITY OF THE STATUTE

Petitioner challenges the constitutionality of the Louisiana State Medical Practice Act insofar as it regulates the performance of abortions on the grounds

that it is an arbitrary invasion of the right of the physician to prescribe for his patient in accordance with his best professional knowledge and that it is also an arbitrary invasion of the fundamental right of a woman to determine when to bear offspring.

Petitioner further alleges that there is no compelling state interest sufficiently strong to justify the prohibition of abortion by a licensed physician on a woman who desires the abortion and that the statute is a law respecting the establishment of religion in violation of the constitution because the primary purpose or effect is the advancement of a religious dogma.

It is respectfully submitted that this Honorable Court is without jurisdiction to consider these questions because they were not seasonably raised in nor passed upon in the Louisiana State Supreme Court. *Ellis v. Dixon*, 349 U.S. 458 (1955); *Herdon v. Georgia*, 295 U.S. 441 (1935).

CONCLUSION

On the basis of the foregoing, it is respectfully submitted that no federal question of substance has been properly raised by the facts of this case or seasonably raised by the pleadings to justify review by certiorari. Furthermore, all proceedings below were conducted in the accepted and usual course of judicial and administrative proceedings so as to preclude the need for an exercise of this Honorable Court's power of sup-

ervision. Therefore, the writ of certiorari prayed for should be denied.

RESPECTFULLY
SUBMITTED,

ADAMS AND REESE

By: _____
RICHARD C. BALDWIN
THOMAS J. WYLLIE
847 National Bank of
Commerce Building
New Orleans, Louisiana
Attorneys for Respondent,
Louisiana State Board of
Medical Examiners

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing opposition to petition for writ of certiorari has this day been placed in the United States mail, postage prepaid and addressed to Mr. Benjamin Smith of Smith, Scheuermann & Jones, 305 Baronne Street, New Orleans, Louisiana.

New Orleans, Louisiana, this ___ day of _____, 1969.

_____
RICHARD C. BALDWIN

EXHIBIT A

SUMMARY OF THE TRANSCRIPT OF THE BOARD'S ADMINISTRATIVE HEARING IN EVIDENCE AS COURT EXHIBIT No. 8

A. Present were:

1. All members of the Louisiana State Board of Medical Examiners: Rhett McMahon, M.D., President; J. Morgan Lyons, M.D., Secretary-Treasurer; Robert P. Lucas, M.D., Charles B. Odom, M.D., and Richard E. C. Miller, M.D., members.

2. Attorneys representing Louisiana State Board of Medical Examiners: Adams and Reese, Attorneys at Law, through Messrs. Richard C. Baldwin and Thomas J. Wyllie.

3. Attorneys representing Dr. Sidney C. Knight: Frank V. Zaccaria and A. J. Graffagnino.

4. Also present: Dr. Sidney C. Knight, respondent; Mrs. May M. Hebert, Board Secretary; and Mrs. Helen R. Dietrich, reporter.

B. Witnesses who testified and resume of their testimony:

1. MISS CHARMAINE MARTHET who testified that on March 22, 1965, she went to Dr. Sidney Knight's office with a Jefferson Parish woman deputy, Shirley Guagliarado, at approximately 5:30 or 6 P.M.; that Miss Guagliarado was at all times with her except when she saw Dr. Knight; that she saw Dr. Knight alone and asked him to perform an abortion on her; that because he had had prior trouble with the Board of Medical Examiners and thought Miss Marthet was an informer, he had first declined to do so; that he finally consented and put her on the examination table; that he opened her up with a speculum; that after doing so he introduced an instrument known as a probe into her womb five or six times; that thereafter she left accompanied by Mrs. Guagliarado; that they met Captain William Warner of the Jefferson Parish Sheriff's office and Mr. Frank Cefalu and others about two blocks away at Tharp-Sontheimer Funeral Home where same were waiting for her; that she was thereafter taken to Dr. Mark Parker's office for an examination; that she had been to Dr. Parker immediately before going to Dr. Knight's office for an examination; that she had been to see Dr. Fowler on March 19 and 22, 1965, to make sure she was pregnant; that the results of her pregnancy tests were positive; that she decided she was going to have an

abortion despite Captain Warner's and Mr. Cefalu's attempts to dissuade her; Dr. Parker sent her home on the night of March 22; that she went directly home, took a sleeping pill and at 3 o'clock awoke because she was bleeding heavily; she was advised by Dr. Fowler to put her legs up and lie down; that the next day she went to Southern Baptist Hospital and remained there from March 23, 1965, to March 31, 1965; that she temporarily stopped bleeding on March 31 and was released from the hospital; that on March 31, 1965, she was taken directly from the hospital to testify at the preliminary hearing pertaining to criminal charges against Dr. Knight; that immediately after the preliminary hearing she was taken to the Convent of the Good Shepherd or Our Lady of the Lake Convent where she stayed until April 3, 1965; that on April 3, 1965, she again began bleeding heavily and was taken back to Southern Baptist Hospital; that on April 6, 1965, she passed a fetus; that she is sure Dr. Knight performed an abortion on her; that she has known Dr. Knight since late 1961 or early 1962; that during this period she has often gotten prescriptions for barbiturates and amphetamines without an examination on many occasions; that she got the prescriptions simply by asking for them.

2. MISS SHIRLEY GUAGLIARDO who testified that she is a deputy sheriff for the Parish of Jefferson; that on March 22, 1965, she took down a statement from Miss Marthet in Captain Warner's office because she was secretary to Captain Warner; that she, Mr. Cefalu and Miss Marthet left Captain Warner's office at 5 P.M.; that Mr. Cefalu let them out of a car near Dr. Knight's office; that she went with Miss Marthet into Dr. Knight's office and stayed with her until Dr. Knight took Miss Marthet into his office; that Dr. Knight and Miss Marthet came out of the office and went into the examination room alone; that they stayed there fifteen or twenty minutes at most; that before Miss Marthet went to Dr. Knight, Deputy Gloria Gunter came in; that Deputy Gloria Gunter was still there when she and Miss Marthet left; that after leaving she and Miss Marthet met Captain Warner, Mr. Cefalu and other deputies at Tharp-Sontheimer Funeral Home near Dr. Knight's office; that Dr. Mark Parker thereafter examined Miss Marthet around 7 P.M.; that she did not know Miss Marthet prior to March 22.

3. CAPTAIN WILLIAM J. WARNER who testified that he is a captain of the Jefferson Parish sheriff's office in charge of vice and narcotics; that he interviewed Miss

Marthet on March 22, 1965, when she came in stating she was pregnant and she was going to have an abortion; that he tried to talk her out of it; that he could not and he thereafter took a statement from her pertaining to alleged previous abortions by Dr. Knight; that he asked his secretary Miss Shirley Guagliardo to accompany Miss Marthet to Dr. Knight's office; that thereafter Mr. Cefalu, Miss Guagliardo and Miss Marthet left and went to Dr. Knight's office; that later he met these three people at Tharp-Sontheimer Funeral Home near Dr. Knight's office; that Miss Marthet related to him that Dr. Knight had performed an abortion on her; that on March 23, 1965, he served a search warrant on Dr. Sidney Knight along with Lieutenant Fred Roth and Richard Tompson; that a metal probe was obtained; that he placed Dr. Knight under arrest.

4. DR. MARY FRANCES MAYFIELD who testified that she is a licensed medical doctor in the State of Louisiana and was at the time a pathologist at Southern Baptist Hospital; that she performed a Wampole test on a specimen of Miss Marthet submitted at the request of Dr. Fowler to determine if Miss Marthet was pregnant; that the test was positive; that on March 22, 1965, Miss Marthet was not a patient

at the hospital; that a further Wampole test was performed on March 23, 1965, when Miss Marthet was an in-patient at the hospital; that the test was positive; that another test was performed on material expelled from the uterus of Miss Marthet on April 6, 1965; that the test indicated a macerated fetus was expelled; that it was a male fetus of approximately a 14-week gestation.

5. DR. ROBERT R. FOWLER who testified that he is a licensed practicing physician in the State of Louisiana; that he first saw Miss Marthet on March 18, 1965, to examine her to see if she was pregnant; that he determined that she was 12 to 14 weeks pregnant; that on March 22, 1965, he again tested her to see if she was pregnant and this time had a specimen sent to Baptist Hospital to determine through a Wampole test whether she was pregnant; that the tests were positive, both the clinical test and the physical examination; that he did not see her again until March 23, 1965, when he saw her with moderate to severe vaginal bleeding, severe lower abdominal cramps, temperature and severe pelvic tenderness; that upon examination, the cervix was a good 1½ to 2 fingers dilated; that the uterus was exquisitely tender; that there was a feeling of a mass exquisitely tender in the right adnexal area and he

diagnosed this at the time as an incomplete versus inevitable abortion with a possibility of a right broad ligament hematoma and a severe, acute pelvic inflammatory disease; that he kept her in the hospital from March 23 until March 31, 1965; that he consulted with Dr. Jason Collins on the case; that Dr. Collins examined her and found the same findings and a diagnosis of imcomplete versus inevitable septic abortion and a possibility of a haemoperitoneum on the right side; that she left the hospital on March 31 but came back in on April 3, 1965, when she was again tender, had vaginal bleeding and the cervix was still dilated; that on April 6, 1965, she expelled a macerated fetus; that at no period from the first time he saw Miss Marthet up to the time she aborted the macerated fetus was any instrumentation used by him; that both he and Dr. Collins had thought this would be hazardous in view of her bleeding; that even though he and Dr. Collins had made a diagnosis of inevitable abortion, Miss Marthet was allowed to go from the hospital on March 31 because in a large number of cases a fetus cannot be viable and can be carried for a good period of time; that when a dead fetus is carried the uterus will go into a spontaneous contraction within a period of days or weeks and expel the fetus itself and that this is what he

believes happened when she was admitted again on April 3, 1965; that it is a physical impossibility to dilate the internal os with the intrusion of a finger; that a simple pelvic examination cannot produce an abortion.

6. DR. ALTON MARK PARKER who testified that he is a practicing licensed physician in the State of Louisiana; that he is assistant coroner for Jefferson Parish; that he examined Miss Marthet on March 22, 1965, for the first time; that he did an abbreviated physical and a pelvic examination at approximately 4:45 P.M. in his office; that the pelvic examination revealed a succulent cervix discolored blue that was soft and closed at the internal ring not admitting the tip of his finger; that the uterus was noted to be approximately 12 to 14 weeks gestational size; that his diagnosis was that the patient was 12 to 14 weeks pregnant; that he next saw Miss Marthet on the same day at approximately 7:40 P.M. in his office; that he performed another examination which found again the bluishly discolored cervix that now admitted the tip of his examining finger at the level of the internal os; that there was a greater degree of surface irritation to the vaginal introitus; that his findings on the second examination as compared with those of the first would be con-

sistent with those found after deliberate instrumentation of a pregnant uterus and cervix; that they would not be consistent with a normal routine pelvic examination, no matter how vigorous; that the internal ring would not be dilated even under vigorous pelvic examination; that there is nothing other than instrumentation which would ordinarily produce the findings of the second examination within the time period he saw Miss Marthet; that Miss Marthet told him that Dr. Knight had probed her in between the time she first saw Dr. Parker and the second time she saw him; that the only thing which he believes could reasonably have occurred between the two visits would have been instrumentation to dilate the internal ring to the extent that it was dilated; that the internal os was completely closed on his first examination, but on the second examination it admitted the tip of his finger without forcing the ring; that Miss Marthet was accompanied by Miss Guagliardo and Mr. Cefalu, when she came back to the office to be examined.

Dr. Knight did not testify. He was represented by his attorneys. Mr. Zaccaria, on his behalf, made certain objections noted in the record. It was also noted that the Board made a determination to allow Dr. Knight additional time within which to produce any witnesses

he would desire to produce and that on the advice of his counsel, Dr. Knight chose to close the matter at this time rather than put on any evidence.

EXHIBIT B

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, STATE OF LOUISIANA

No. 451-628 DIVISION "F" DOCKET No. 5

DR. SIDNEY C. KNIGHT

versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

JUDGMENT

This cause having been heretofore heard and submitted to the Court for adjudication on the application of Dr. Sidney C. Knight, relator herein, for a writ of mandamus and injunction, and the Court considering the law, evidence, argument of counsel, briefs filed by counsel, and for the written reasons herein filed and made part of the record:

AT WHICH HEARING THERE WERE PRESENT:

DOUGLAS ALLEN, Attorney for Dr. Sidney C. Knight

THOMAS J. WYLLIE, Attorney for Louisiana State Board of Medical Examiners

IT IS ORDERED, ADJUDGED AND DECREED, that the alternative writ of mandamus and injunction herein issued be recalled, set aside and annulled and that the Relator's suit is dismissed at his costs.

JUDGMENT READ, RENDERED, AND SIGNED, IN OPEN COURT APRIL 13, 1967.

(Signed) A. E. RAINOLD
JUDGE

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, STATE OF LOUISIANA

No. 451-628 DIVISION "F" DOCKET No. 5

DR. SIDNEY C. KNIGHT

versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

REASONS FOR JUDGMENT

Dr. Sidney C. Knight brings this Petition for a Writ of Mandamus and Injunction to order the Louisiana State Board of Medical Examiners to reissue his license to practice medicine which was suspended following an administrative hearing by the Board on charges alleging that he performed an abortion on Charmaine Marthet on March 22, 1965.

Dr. Knight alleges that the Board's action was arbitrary, malicious and capricious with reference to the administrative hearing. He further alleges that the Louisiana State Board of Medical Examiners and others conspired to deprive him of due process of law; that the decision of the Board on May 1, 1965 suspending his license was prejudicial, and alleges that the Board, its investigators and the Jefferson Parish Sheriff's Office and Charmaine Marthet conspired to manufacture evidence and testimony against him. He denies performing any abortion on a person by the name of Charmaine Marthet.

The record shows that on May 1, 1965, Dr. Knight appeared before the Board with his then attorney, Mr. Zaccaria, pursuant to a notice of April 5, 1965 that a hearing would be held by the Board on "moral and professional conduct; moral and professional competence; your alleged procuring, aiding or abetting in procuring one or more abortions or attempting same; prescribing of habit-forming drugs in other than a legal and legitimate manner," which notice was later condensed and clarified by stipulation between his counsel and counsel for the medical board to be "those matters arising out of Dr. Knight's arrest on May 22 and May 23."

Counsel for Relator complains that the notice was not adequate of the charges and specifications. This Court is of the opinion that Dr. Knight had adequate notice of the charges and specifications.

It is further the opinion of the Court, as shown by the record of the hearing before the Board which is in evidence and from the testimony adduced at this trial, that the charge in Dr. Knight's Petition for a Writ of Mandamus that the decision of the Board suspending his license is without foundation; and that the Relator failed to prove that the Board, its investigators and the Jefferson Parish Sheriff's Office conspired to manufacture evidence against him.

The record of the hearing before the Louisiana State Board of Medical Examiners and the evidence in this case failed to show that the Board's decision was arbitrary or capricious. The testimony before the Board and in this Mandamus action leaves no doubt that Dr. Sidney C. Knight did perform an abortion on Charmaine Marthet on March 22, 1965.

It is significant to note that although Dr. Knight attended the hearing of this Mandamus case, which consumed five days of the Court's time, he failed to take the witness stand in his own behalf.

Dr. Knight by Supplemental Petition complains that the action of the Louisiana State Board of Medical Examiners suspending his license for five years is tantamount to revocation of his license, and that the Board has no power so to do. In the opinion of the Court, the Board had the power to suspend his license for a period of five years.

By second Supplemental Petition Dr. Knight alleges that the testimony of two witnesses who appeared be-

fore the Board was incredible. The Court finds no foundation whatsoever for these charges and allegations.

Petitioner alleges that the Medical Practice Act is unconstitutional in that Paragraph 6 of R.S. 37:1825 is an unlawful and unauthorized extension of the authority granted to the Legislature by Article 6 Section 12 of the Constitution of the State of Louisiana of 1921, and that the Medical Practice Act fails to establish subpoena power, and, therefore, there is no method by which an accused can compel the attendance of witnesses, and, accordingly, that the Act denied Dr. Knight due process of law.

The Medical Practice Act is constitutional. See *Louisiana State Board of Medical Examiners vs. Fife*, 162 La. 681, 111 So. 58, Affirmed 274 U.S. 720. (1927). The regulation of the practice of medicine is a proper delegation of the State's police power, and the right to practice medicine is not an absolute right. *La. State Bd. of Medical Examiners v. Booth*, 76 So. 2d 15 (1955). The Act has been held as not a violation of the constitutional rights to due process and equal protection of the laws because requirements for the right to practice appear to be based on arbitrary or discriminatory grounds. *La. State Bd. of Medical Examiners v. Weller*, 77 So. 2d. 166 (1955); for any statute is valid if its intent and purpose are susceptible of reasonable interpretation, *La. State Bd. of Medical Examiners v. Tackett*, La. App., 71 So. 2d 137 (1954); and if the ruling of the Board was arbitrary the remedy is review by a competent Court.

With regard to Plaintiff's allegation that the Medical Practice Act failed to establish subpoena power, it is sufficient to state that the Board is not a judicial tribunal, performs no judicial function, and therefore the suspension of a license should not take the form of a trial.

The Supreme Court of the United States has declared that in administrative proceedings due process does not require a particular form or method of procedure, but that its requirements are satisfied if the person affected by the proceeding has reasonable notice and reasonable opportunity to be heard and to present his claim or defense. *Hurwitz v. North,* 271 U.S. 40, 46 S.Ct. 384 (1926).

Accordingly, Relator's application for a Writ of Mandamus and Injunction will be recalled and denied and Relator's suit dismissed at Relator's costs.

(Signed) A. E. RAINOLD
JUDGE

New Orleans, Louisiana
April 13, 1967.

EXHIBIT C

COURT OF APPEAL
FOURTH CIRCUIT — STATE OF LOUISIANA

DR. SIDNEY C. KNIGHT

versus No. 2807

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

APPEAL FROM THE CIVIL DISTRICT COURT, PARISH OF ORLEANS, STATE OF LOUISIANA, No. 451-628, HONORABLE A. E. RAINOLD, JUDGE.

L. JULIAN SAMUEL, JUDGE

(Court composed of Judges Louis H. Yarrut, L. Julian Samuel and Luther E. Hall)

ALLEN & MAMOULIDES
DOUGLAS A. ALLEN,
JOHN M. MAMOULIDES,
RICHARD TROY
for Relator-Appellant

ADAMS & REESE
THOMAS J. WYLLIE
for Respondent-Appellee

AFFIRMED

Dr. Sidney Knight filed this suit against the Louisiana State Board of Medical Examiners, seeking: (1) by mandamus to compel the Board to reinstate his license to practice medicine; alternatively (2) to en-

join the Board from refusing to reinstate that license; and in the further alternative (3) that the Court annul an administrative action suspending the license for a period of five years.

Essentially, plaintiff contended: (1) LSA-R.S. 37:-1285, the statute under which his license was suspended, is invalid insofar as it fails to set a maximum time limit on suspensions; (2) he was deprived of a property right without due process of law because of the manner in which the hearing was conducted; and (3) the Board conspired to manufacture evidence against him and then improperly concluded he had performed an abortion on one Mrs. Smith, the finding which resulted in the suspension of his license.

When the petition was filed the Court issued alternative writs of mandamus and injunction. The defendant Board then pleaded various exceptions including an exception of lis pendens which the trial court maintained. On appeal from that judgment this Court reversed and remanded the matter for further proceedings. See *Knight v. Louisiana State Board of Medical Examiners*, 195 So.2d. 375.

After a trial on the merits following remand judgment was rendered recalling the alternative writ of mandamus and injunction and dismissing the suit. Plaintiff has appealed.

The litigation stems from the defendant Board's suspension of Dr. Knight's license to practice medicine for five years after determining he had illegally performed an abortion. The Board's authority for this ac-

tion is LSA-R.S. 37:1285, which provides in pertinent part:

> "The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate issued under this Part for any of the following causes:
>
> (6) Procuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician; . . ."

The events leading to the suspension, which he now asserts constitute a conspiracy to deprive him of his license, are these:

In March, 1964 the Board summoned Dr. Knight to appear before it to answer charges that he had performed an abortion on one Mary H., who was not available to testify because she had left the state. Dr. Knight was present and represented by counsel. Because the evidence was inconclusive, his license was not suspended; however, his 1964 renewal license was issued on a probationary status. This meant that his professional activities would be subject to investigation by the Board in the future.

In November, 1964 Dr. Knight was notified of a hearing by the Board regarding charges that he had performed an abortion on a Mrs. Smith (who was an ad-

mitted prostitute). After receiving this notification, Dr. Knight persuaded Mrs. Smith to sign an affidavit stating he had never performed an abortion on her and she never had an abortion performed. The doctor forwarded the affidavit to the Board and later was notified by them that the hearing had been cancelled. The Board did convene on December 10, 1964, the scheduled date of the hearing, at which time it interviewed several witnesses concerning alleged abortion activities of Dr. Knight and two other physicians in the greater New Orleans area. No action was taken against Dr. Knight at that meeting.

Thereafter the defendant hired Southern Research, a local detective agency, to investigate Dr. Knight. Frank Cefalu, one of the agency's employees, conducted most of the investigation. While making inquiries, he interviewed the Mrs. Smith who had previously appeared before the Board in December, 1964. In March, 1965 Mrs. Smith informed Cefalu she again was pregnant and intended to ask Dr. Knight to perform an abortion. Cefalu reported this to his office and was instructed to relay the information to the Jefferson Parish authorities. After this had been done, he and the Parish officials attempted to dissuade Mrs. Smith from going through with the abortion. Having failed in the attempt, Cefalu and the Jefferson Parish authorities decided to gather evidence to establish an abortion had been performed, should the act be committed.

Mrs. Smith consulted Dr. Knight on March 23, 1965. Before going to his office she was examined by two doctors, both of whom confirmed her pregnancy. In

addition, their diagnoses were supported by positive laboratory tests. After her pregnancy was confirmed she went directly to the office of Dr. Knight in the company of a female deputy sheriff. When Mrs. Smith was called into a private examination room, the deputy remained in the waiting room for approximately twenty minutes until she returned. According to Mrs. Smith, Dr. Knight probed the uterus five or six times with an instrument in order to abort pregnancy as she had requested.

Immediately after leaving Dr. Knight's office she was returned for re-examination to the office of one of the doctors who had diagnosed pregnancy. His findings were that the physiological changes in Mrs. Smith's cervix could only have been caused by the instrumentation she had described. There was a time lapse of only three hours between this doctor's first examination, before she visited Dr. Knight, and the second examination, made after she had seen Dr. Knight.

Mrs. Smith then returned home. That same night she began bleeding profusely. She consulted a doctor who had examined her before the abortion and he sent her to Baptist Hospital the next day. On admission her condition was diagnosed as acute pelvic inflammatory disease and possible incomplete abortion.

On March 23, 1965 Jefferson Parish officials arrested Dr. Knight on the criminal charge of abortion.

Mrs. Smith remained in Baptist Hospital until March 31, 1965, receiving treatment which retarded ex-

pulsion of the fetus. On her release she was taken directly to court to testify in the preliminary hearing on the criminal charges against Dr. Knight.

At this hearing Dr. Knight was represented by counsel and was fully informed of the facts upon which the charges for which he was arrested were based. The court reached a finding of probable cause and bound the accused over for trial on the charges of criminal abortion.

On April 3, 1965 Mrs. Smith began hemorrhaging again and was returned to Baptist Hospital where her condition was provisionally diagnosed as incomplete abortion. On April 6, 1965 she finally aborted expelling a dead three and a half month old male fetus.

On April 5, 1965 the defendant notified Dr. Knight that a hearing would be held on May 1, 1965 concerning charges of unprofessional conduct. The letter of notification read:

"Dear Doctor Knight:

The Louisiana State Board of Medical Examiners requests that you appear at the office of the Board, 521 Hibernia Bank Building, New Orleans, Louisiana, at 9:00 A.M., on Saturday, May 1, 1965, for a hearing before the Board on your moral and professional conduct; moral and professional competence; your alleged procuring, aiding or abetting in procuring one or more abortions or attempting

same; prescribing of habit-forming drugs in other than a legal and legitimate manner.

You are duly advised of the fact that you may present any witnesses or evidence that you wish, and you have the right to be represented by counsel if you so desire.

Your prompt acknowledgment of receipt of this notice will be appreciated.

Yours very truly,

J. MORGAN LYONS, M.D.
Secretary - Treasurer"

Dr. Knight's attorneys, Frank Zaccaria and A. J Graffagnino, attempted to cancel the May 1st hearing by obtaining a temporary restraining order from the Civil District Court for the Parish of Orleans. When this failed, Mr. Zaccaria telephoned a member of the Board requesting more particulars on the charges Dr. Knight would have to answer at the hearing. He was advised the hearing would be restricted to matters for which Dr. Knight was arrested on March 23, 1965. As the same two attorneys also had acted as Dr. Knight's counsel for the preliminary hearing on March 31, 1965, they were fully apprised of the facts upon which the criminal charges were based. We desire at this time to make it clear there is no indication of any improper action on the part of Dr. Knight's attorneys; all of the evidence contained in the record is to the contrary.

In another court action stemming from Dr. Knight's ultimate suspension, i.e., an injunction proceeding initiated by the Board to prohibit Dr. Knight's continued practice of medicine after his suspension, Mr. Zaccaria, again representing Dr. Knight, stipulated he was informed before the hearing that charges to be heard would consist only of matters for which Dr. Knight was arrested in March. He further stipulated the hearing was in fact limited to these charges.

The formal hearing was held as scheduled. Although a motion for a continuance made on Dr. Knight's behalf was denied, the Board offered to hold the hearing open to permit Dr. Knight to introduce rebuttal evidence after the testimony of all the Board witnesses was heard. On the advice of his attorneys, Dr. Knight did not testify because it was feared in so doing he would prejudice his defense of the criminal charges then pending. The doctor's attorneys also declined the Board's offer to hold the hearing open to permit the introduction of rebuttal evidence.

On May 5, 1965 Dr. Knight was notified he was suspended for a period of five years.

From this evidence the trial court concluded the Board acted properly in suspending Dr. Knight for five years under the authority of LSA-R.S. 37:1285. The trial court further concluded the administrative hearing fully proved Dr. Knight had performed an abortion and that the opportunity afforded to him to answer the charges met the requisites of due process of law.

Plaintiff first argues R.S. 37:1285, as applied by the trial court, would be invalid because quasi-penal statutes should be strictly construed. In accordance with the rules of strict construction, plaintiff asserts, the suspension provision is invalid because the period for which suspension may be imposed has not been defined and the five year ruling of the Board is tantamount to revocation. Relying on *City of New Orleans v. Stein*, 137 La. 652, 69 So. 43, plaintiff argues there can be no crime that is not defined by statute and for which the legislature has imposed no specific penalty.

The cited case declares invalid an ordinance giving the Board of Health power to punish by imprisonment violators of certain health regulations. The Court held that the power to punish by imprisonment must be specifically defined. In our view the cited case is inapposite because it deals with a criminal statute. The statute here attacked by plaintiff as too vague and indefinite is distinguishable. It is a regulatory provision passed by the legislature to insure that the medical profession in this state will meet certain standards of conduct consistent with the needs of the general welfare of is people. The penalty for failure to do so is not imprisonment; one who violates rules of ethical practice simply may lose his right to practice medicine, either temporarily or permanently.

Citing *Sciortino v. Louisiana State Board of Cosmetology*, 194 So.2d 409, as authority for the proposition that laws which deprive a professional man of his license are quasi-penal and must be construed strictly, plaintiff argues that its failure to define a suspension

invalidates R.S. 37:1285 because the Board is giving sweeping powers not limited by the legislature; he asserts the five year suspension is tantamount to revocation, an action which the statute provides can be taken only by the courts.

In the Sciortino case the Board of Cosmetology attempted to revoke the license of a cosmetologist charged with fraudulently attempting to obtain certificates for others for money or anything of value by fraudulent means. Because the facts failed to support that Sciortino had himself attempted to obtain the certificates or had received anything of value from those applicants he had fraudulently assisted, the Court held his license could not be revoked because the evidence failed to prove him guilty of the statutory offense he had been charged with violating.

If the reasoning of *Sciortino* were applied to the instant case, it would fully support the Board's action. Dr. Knight was charged with committing an abortion. The evidence overwhelmingly supports the conclusion he did perform an abortion on Mrs. Smith as he was charged. Although on the trial of this mandamus he attempted to establish by expert testimony that the medical facts recited to the Board were preposterous, and the Board composed of physicians well knew the medical evidence did not support its conclusion that he had performed an abortion, his own expert witness testified the Board's conclusion was reasonable. Apparently plaintiff failed to give the entire history of Mrs. Smith to his expert. However, on cross examination, defense counsel propounded a hypothetical ques-

tion based on the medical facts recited hereinabove, and plaintiff's expert agreed it was reasonable to conclude there was an abortion as the result of instrumentation.

Unlike *Sciortino*, the evidence in this case establishes Dr. Knight's action falls within the statutory prohibition. We conclude a five year suspension is not equivalent to revocation nor is it oppressive considering the gravity of the offense.

Plaintiff also contends the Board cannot impose the penalty of suspension because its conclusion was based on evidence obtained by entrapment. While we are inclined to view entrapment as a defense only against a criminal charge (see *State v. Ward*, 361 Mo. 1236, 239 S.W.2d 313), we conclude that even if the rule is applicable, the requisites of entrapment are not met in the instant case. In 22 C.J.S. Criminal Law 45 (2) the elements of entrapment are outlined as follows:

> "'Entrapment,' within the rule recognizing it as a defense, as discussed supra § 45 (1), is shown where it appears that officers of the law or their agents incited, induced, instigated, or lured accused into committing an offense which he otherwise would not have committed and had no intention of committing. Stated otherwise, entrapment is the conception and planning of an offense by an officer and the procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the of-

> ficer. Entrapment occurs only when the criminal conduct is the product of the 'creative activity' of law enforcement officials, that is, only where the criminal design originates in the mind of the police officer and not with accused, . . ."

Not only did the law enforcement officials and the Board's representatives not originate the plan for Mrs. Smith to ask Dr. Knight to perform an abortion, but representatives from both groups attempted to dissuade her from this course of action. In addition, Mrs. Smith's father was contacted and asked to do what he could to prevent his daughter from having the abortion performed.

Finally, plaintiff urges his suspension was invalid because he was not given sufficient notice of the specific charges to be heard by the Board. We agree that the letter advising him of the May 1, 1965 hearing did not, in itself, sufficiently inform him of those charges. However, before the hearing his counsel was advised the charges would be confined to those matters for which he was arrested on March 23, 1965. In view of the fact that he was represented by the same attorneys at both the preliminary hearing on March 31, 1965, where the criminal charges were fully outlined, and the Board hearing on May 1, 1965, we are convinced that Dr. Knight and his attorneys knew exactly what charges of professional misconduct would be heard by the Board. In addition, according to the admission of one of Dr. Knight's attorneys, the charges against Dr. Knight were specifically outlined by a

Board member to that attorney in a telephone conversation before the hearing was held.

To meet the requisites of procedural due process the notice must be reasonably calculated to apprise the accused of the pending action and to afford him an opportunity to defend himself. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 315, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873, the Supreme Court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580, 53 L.Ed. 914. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional

> requirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' American Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82, and see Blinn v. Nelson, 222 U.S. 1, 7, 32 S.Ct. 1, 2, 56 L.Ed. 65, Ann. Cas. 1913B, 555."

Applying the test of *Mullane* to the instant case, we conclude that the constitutional requisites of adequate notice have been met. In our view Dr. Knight was fully apprised of the charges before the hearing was held. In fact, we conclude the Board afforded the accused more than ample opportunity to refute the charges against him. Even after all the evidence was heard, he was afforded the opportunity to present rebuttal evidence at a later date, an opportunity he rejected.

Since we have concluded that the Board's finding of fact is based on substantial evidence and the law it applied is legally permissible and not arbitrary or capricious, we conclude the trial court properly recalled the alternative writ of mandamus and injunction previously issued.

For the reasons assigned the judgment appealed from is affirmed.

AFFIRMED.